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No. 675

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Supreme Court of the United States

OCTOBER TERM, 1958

IRVING D. FRIEDMAN,

Appellant,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT.

IRVING D. FRIEDMAN,
Appellant, Pro Se,
1501 Broadway,
New York 36, N. Y.

See Friedman,
1707 New York Avenue, N. W.,
Washington 5, D. C.

Patrick Press, Inc., 25 Thames St., New York 6, N. Y. U. S. A.

TABLE OF CONTENTS.

	PAGE
(a) Opinions Below	1
(b) The Grounds on which Jurisdiction of the Supreme Court of the United States is Invoked	2
(c) The Questions Presented by the Appeal	4
(d) The Material Facts of the Case	5
(f) The Questions Presented are Substantial	9
(1) The merger terms are not just and reasonable, as required by Section 5(2) of the Interstate Commerce Act, because they violate the obligation of contract	9
(2) There is no reasonable basis for the Commission's conclusion that $155 and $123.50 are fair prices for the "Alabama" and "Vicksburg" shares of Capital Stock	11
(3) The Questions Presented Are So Substantial as to Require Plenary Consideration	15
(g) The District Court Abused Its Discretion by Denying Appellant an Injunction Against the Mergers	16
Appendix:	
The Opinions Below	18

Cases.

	PAGE
Alleghany Corporation v. *Breswick*, 353 U. S. 151	3
County of Marin v. *United States*, 356 U. S. 412	3
Illinois Central Railroad Company-Merger-Alabama & Vicksburg Railway Company, 295 I. C. C. 731	1
Schwabacher v. *United States*, 334 U. S. 182	3

Statutes.

Interstate Commerce Act,
Section 5(2) 2, 3, 6, 9, 11, 14

United States Code,
Title 5, Section 1009 2
Title 28, Sections 1336, 2284, 2321 to 2325, 1253 2
Title 49, Section 5 2
Title 49, Section 5(2) 3

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

IRVING D. FRIEDMAN,

Appellant,

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UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

JURISDICTIONAL STATEMENT.

Appellant files this Jurisdictional Statement in compliance with paragraph 2 of Rule 13, and Rule 15, of the Rules of this Court.

(a) Opinions Below.

The report of the Interstate Commerce Commission in this case is reported in 295 I. C. C. 731. It is attached to the Complaint, which is in the record. The opinion of the United States District Court, Southern District of New York, which affirmed the report of the Commission has not yet been officially reported. It is Opinion No. 24757, dated December 23, 1958, filed with the Clerk of the United States District Court, Southern District of New York, in Civil Action File No. 138-351. The opinion of the District Court is set forth in full in the Appendix hereto at pages 18 to 25.

(b) The Grounds on which Jurisdiction of the Supreme Court of the United States is Invoked.

(i) The action in the United States District Court, Southern District of New York, was instituted by Appellant, pursuant to Title 28, United States Code, Sections 1336, 2284, 2321 to 2325, and Title 5, United States Code, Section 1009, to review, annul and set aside the Report and Order of the Interstate Commerce Commission which had authorized the mergers of the Alabama and Vicksburg Railway Company and the Vicksburg, Shreveport & Pacific Railway Company into the Illinois Central Railroad Company. The aforementioned railroad corporations, hereinafter referred to as "Alabama", "Vicksburg", and Illinois Central, intervened as parties defendant in the District Court, and each of them is an appellee in this action.

The railroads had filed applications to merge the "Alabama" and the "Vicksburg" into the Illinois Central, pursuant to Section 5(2) of the Interstate Commerce Act, Title 49 of the United States Code, Section 5, and the Commission had approved the terms of the merger as proposed by the railroad appellees.

(ii) The orders and judgments sought to be reviewed are: the report and order of the Interstate Commerce Commission, dated April 14, 1958; the order of the Commission denying appellant's motion for a reconsideration, dated September 29, 1958; and the order and judgment of the United States District Court, Southern District of New York, dated December 23, 1958. The notice of appeal to the Supreme Court of the United States was filed in the United States District Court, Southern District of New York, on December 26, 1958.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1253.

(iv) Cases sustaining the jurisdiction of this Court are: *Schwabacher* v. *United States*, 334 U. S. 182; *Alleghany Corporation* v. *Breswick*, 353 U. S. 151; and *County of Marin* v. *United States*, 356 U. S. 412.

(v) The pertinent part of the statute of the United States that is involved in this case is Section 5(2) of the Interstate Commerce Act, Title 49 U. S. Code, Section 5(2) which provides:

"Unification, Mergers, and Acquisitions of Control.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case

carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable."

(c) The Questions Presented by the Appeal.

This case presents the following questions:

(1) Does Section 5(2) of the Interstate Commerce Act, which gives the Commission the power to merge railroads on terms that are just and reasonable, give the Commission the power to void a long term lease between two railroads, where there are minority stockholders who have a vested interest in the lease?

(2) Does the Commission have the power, in approving a merger under Section 5(2) of the Interstate Commerce Act, to capitalize the income from a long term lease, payable by a solvent railroad, and require the lessor to take less than the total amount of the rental required to be paid over the term of the lease?

(3) Where a leased line stockholder's Capital Stock is being taken away from him in a merger

under Section 5(2) of the Interstate Commerce Act, is such stockholder entitled to the rental under the lease, and, in addition, to have his Capital Stock appraised, in the merger proceeding, on the basis of the actual earning power of his corporation?

(d) The Material Facts of the Case.

Appellant is a stockholder in the "Alabama" and in the "Vicksburg" companies. In 1925 the "Alabama" and the "Vicksburg" companies leased all of their properties to a predecessor in interest of the Illinois Central for terms of 357 years, expiring July 1, 2282, at a rental equal to six per cent (6%) on the $100 par value of the Capital Stock of "Alabama", and five per cent (5%) on the $100 par value of the Capital Stock of "Vicksburg", which was then outstanding.

The leases were filed with The New York Stock Exchange, where the "Alabama" and "Vicksburg" stocks were listed, and endorsements summarizing the payments required to be made by the Illinois Central, the term of the leases, and Illinois Central's unconditional guarantees of the due and punctual payment of all sums required to be paid by the Lessee, were imprinted on each stock certificate of the "Alabama" and "Vicksburg".

On the effective date of the leases, the "Alabama" and the "Vicksburg" companies transferred their franchises, real and personal property, and all of their other assets, to the Illinois Central. From that time on, the "Alabama" and "Vicksburg" conducted no operations and had no business whatsoever. The Illinois Central received all of the revenue from the operation of the "Alabama" and "Vicksburg" properties, and paid all of the expenses. The Illinois Central, the tenant under the leases, also paid, and is paying, the annual rental of 6% of the par value of the Capital

Stock of the "Alabama", amounting to $6 per share per year, and 5% of the par value of the "Vicksburg", amounting to $5 per share per year, directly to appellant and all other holders of "Alabama" and "Vicksburg" stock.

The leases terminate on July 1, 2282. They have no earlier termination date. They have no cancellation privileges. The leases authorize mergers only on the condition that a merger shall not release or diminish the obligation of the tenant thereunder, Illinois Central, to pay the rental.

In 1951, Illinois Central began to purchase the capital stock of "Alabama" and "Vicksburg" in the open market. It purchased and now owns 40,123 shares of the 42,000 shares of "Alabama". It purchased and now owns 48,552 shares of the 49,993 shares of "Vicksburg". Appellant owns and represents 480 shares of "Alabama" and 80 shares of "Vicksburg".

In 1957, Illinois Central filed, with the Interstate Commerce Commission, the merger applications which are the subject matter of this case. Illinois Central petitioned the Commission, under Section 5(2) of the Interstate Commerce Act, for approval to merge the "Alabama" into itself, upon payment to the "Alabama" stockholders of $155 worth of Illinois Central's common stock on the effective date of the merger.

Illinois Central asked for similar Commission approval to merge the "Vicksburg" into itself, upon payment to the "Vicksburg" stockholders of $126.50 worth of Illinois Central's common stock, based on the market value of Illinois Central common stock on the effective date of the merger.

Appellant and all other minority stockholders of "Alabama" and "Vicksburg" are given the option to take the $155 and $126.50 in cash if they do not want to take Illinois Central's common stock.

The merger applications propose that the leases between "Alabama", "Vicksburg" and Illinois Central, will be swallowed up and dissolved by operation of law, upon the consummation of the merger; and that appellant's rights, as a stockholder of "Alabama" and of "Vicksburg", and his rights under the leases, and on the guarantees of rental payments endorsed on his stock, wil all be extinguished.

Appellant intervened in the merger proceedings before the Commission, and objected that the terms of the mergers were contrary to law.

The first of appellant's grounds on which he based his contention that the proposed mergers are contrary to law is that the rental payments required to be made on the Capital Stock of "Alabama" and "Vicksburg" until July 1, 2282, are fixed charges and obligations of Illinois Central, which cannot legally be terminated by a merger.

The obligation of Illinois Central to pay the rental under the leases, and the concurrent liability to pay the guaranteed 6% and 5% annual rental on appellant's holdings of "Alabama" and "Vicksburg" stock, over the term of the leases, amounts to $1,942.50 on each share of "Alabama" and $1,618.75 on each share of "Vicksburg". Appellant contended before the Commission that this liability owing by Illinois Central could not be reduced by the act of merging. Such liability, appellant contended before the Commission, must be paid, or assumed, by the company surviving the merger.

Appellant contended before the Commission that when Illinois Central leased the "Alabama" and "Vicksburg" in 1925, it agreed to become liable for the payment of the rental for the duration of the lease; that is, until July 1, 2282.

The second of appellant's grounds of objection to the mergers is that the applications for the mergers failed to

disclose what was the actual value of the "Alabama" and of the "Vicksburg" companies. Appellant contended before the Commission that under the leases and guarantees of rentals, he was entitled to payment of all of the rent required to be paid thereunder; and after receiving that, appellant, being the owner of his pro rata share of the equity of "Alabama" and "Vicksburg", was entitled, as a matter of law, to have the Commission find the value of these companies, based on their earning power and other assets, and to order the payment of such value to appellant.

Appellant contended before the Commission that because the applicants favoring the merger furnished no evidence whatsoever of the assets and earning power of the "Alabama" and "Vicksburg" company, it was impossible to ascertain the values of such companies. On the record before the Commission, no one could tell what they were worth.

The Commission overruled appellant's objections, and approved the mergers. In its report, the Commission held that it had the power to capitalize the value of the rental income payable by Illinois Central to appellant, under the terms of the lease, and to require appellant to take, in full compensation of his rights, not the full rental payable over the term of the leases, but the current capitalized value of such rental.

The Commission also held that appellant was not entitled to a valuation of his "Alabama" and "Vicksburg" shares of Capital Stock, based on the actual earning power and actual value of these corporations, because appellant's "Alabama" and "Vicksburg" corporations had leased away their actual earning power and actual value to Illinois Central. The Commission held that appellant had no rights whatever to the assets and earning power of his corpora-

tions because appellant was strictly limited to the leases, and the income therefrom.

Appellant then brought an action in the District Court to annul and set aside the report and order of the Commission. The District Court agreed with the Commission, and confirmed the Commission's report and order. The opinion of the District Court held that appellant had no vested rights whatever in the leases of the "Alabama" and "Vicksburg" companies to the Illinois Central because appellant was not a party to them.

The District Court held that Illinois Central's guarantee of the due and punctual payment of a sum equal to 6% of the par value of the Capital Stock of "Alabama", and to 5% of the par value of the Capital Stock of "Vicksburg", endorsed on appellant's shares of stock, did not give appellant any claim against Illinois Central for such rental payments. The District Court's opinion held that appellant was just a common stockholder in his companies, with no rights at all against Illinois Central on the leases requiring rental payments for 323 years to be paid on appellant's Capital Stock in "Alabama" and "Vicksburg".

(f) The Questions Presented are Substantial.

(1) The Merger Terms Are Not Just and Reasonable, as required by Section 5(2) of the Interstate Commerce Act, Because They Violate the Obligation of Contract.

It is a principle of law that liabilities owing by solvent corporations cannot be impaired or diminished by the act of merging. All liabilities of merging corporations must be paid, or preserved unimpaired and assumed by the corporation surviving the merger.

The Commission and the District Court allowed the Illinois Central to merge, without continuing to remain

liable for the payment of a liability it owed before the merger. The Commission and the District Court allowed the Illinois Central to use the merger process as a device to break a long term lease.

The District Court held that, under its statutory power to merge railroads, the Commission has the power to appraise the value of a long term lease, and to require the lessor to take such current appraised value, even though it is substantially less than the rental stipulated in the lease, in full extinguishment of the lessor's rights.

Appellant contends that in coming to such a conclusion, the Commission and the District Court departed from the law, because the law does not authorize the appraisal of liabilities owing by solvent corporations. In approving the mergers on the basis that Illinois Central can pay less than what it owed before the mergers, the Commission and the District Court have legalized a breach of contract. Therefore appellant is entitled to have the Commission's approval of the mergers annulled, as a matter of law.

The $155 per share which the Commission and the District Court require appellant to accept as full compensation for his 6% "Alabama" stock, amounts to the rental for only 26 years. The lease obligates Illinois Central to make such rental payments for 323 more years, that is until July 1, 2282, and the total amount of such rental payments under the lease is $1,942.50 per share. It is not just and reasonable to allow Illinois Central to discharge an obligation for 323 years rent by the payment of 26 years rent.

The Commission and the District Court attempt to justify their conclusion, which allows Illinois Central to settle an obligation for 323 years rent by the payment of 26 years rent, on the ground that the Commission has the right to capitalize the income payable to appellant under the lease, and to pay appellant such current capitalized

value. Such a practice is not authorized by law, and it is not authorized by the leases.

The total amount of rent payable by Illinois Central over the term of the lease is $1,942.50 per share, and it cannot be commuted to $155 by an appraisal. Liabilities of solvent corporations must be paid, or assumed, at their actual amount. There is no authority for a corporation that is able to pay its debts, to have its liabilities appraised, and paid off at an appraised value which is substantially less than what it actually owes.

Allowing this claim of $1,942.50 to be redeemed by the payment of $155 is tantamount to payment at 8% of its face value. Authorizing a debtor to pay off a claim at 8¢ on the dollar is the kind of relief given to a bankrupt debtor in a bankruptcy proceeding. It is not relief that should be given to a solvent debtor in a merger proceeding under Section 5(2) of the Interstate Commerce Act.

(2) There Is No Reasonable Basis for the Commission's Conclusion That $155 and $126.50 Are Fair Prices for the "Alabama" and "Vicksburg" Shares of Capital Stock.

In addition to the question of the Commission's right to commute a long term, non-cancellable lease, there is the question of the value of appellant's "Alabama" and "Vicksburg" stocks. The stockholders of "Alabama" and of "Vicksburg" own the equity of their railroads, subject to the terms of the leases to Illinois Central, and this equity has a present value.

Appellant has separate and cumulative rights, as a stockholder in his companies under their charters. Appellant is entitled to be compensated for the value of such equity, when his stock is being taken away from him in a merger.

Appellant should receive payment in full of all the rental he is entitled to under the leases, owed to him by Illinois Central, and, in addition to that, he is entitled to be paid the just and reasonable value of his stock.

Earning power is the proper standard to use to determine the value of a stock. The Commission did not examine the earning power and values of the "Alabama" and "Vicksburg" companies. There is no evidence whatever in the record of the earning power and values of the "Alabama" and "Vicksburg" companies, which are being absorbed in this merger. It is therefore impossible to ascertain what they are worth.

The Commission and the District Court attempt to justify this absence in the record of the actual earning power and value of the "Alabama" and "Vicksburg" companies by stating that appellant is not even entitled to know what the actual values of his companies are, because his companies leased away such value to the Illinois Central. In applying this reasoning to the appellant, the Commission and the District Court made the appellant the victim of unjust and irreconcilable reasoning.

When appellant contended before the Commission and the District Court that he was a creditor and landlord of the Illinois Central, under the leases, in proportion to his holdings of shares in "Alabama" and "Vicksburg", and urged the Commission and the Court to uphold the leases and continue the rental payments required to be made, the Commission and the Court below denied that appellant had any contractual rights at all under the leases. The District Court held that the leases were made by the corporations, and for that reason appellant had no vested interest therein, and had only the rights of a common stockholder.

When appellant asked that his rights as a stockholder in "Alabama" and "Vicksburg" be valued by the Commission on the basis of the actual earning power of appellant's companies, the Commission and the Court below held that appellant was no longer a common stockholder, but was a fixed income stockholder whose rights were confined to the terms of the leases made by his corporations.

What the Commission and the District Court did to the appellant was to treat him as a common stockholder when appellant pointed out his contractual rights under the leases; and to treat appellant as a leased line stockholder, limited to a fixed rental income, when appellant asked for his rights as a common stockholder.

The inconsistency and illegality of what the Commission and the District Court did, was to take away appellant's leasehold rights to receive his guaranteed rentals of $6 a year, and $5 a year, for 323 years, and then confine him to such leasehold rights when appellant asked the Commission to determine the actual value of his railroads.

When it was to Illinois Central's advantage to deny appellant his rentals under the lease, the Commission and the District Court ruled that appellant was a common stockholder with no leasehold rights. When it was to Illinois Central's advantage to deny appellant's rights as a common stockholder, the Commission and the District Court ruled that appellant's rights were strictly limited to the lease, and that appellant had no rights as a common stockholder.

The Commission and the District Court gave appellant all of the disadvantages of a creditor holding a fixed income security, and all of the disadvantages of a common stockholder, and they gave appellant none of the advantages. The Commission and the Court below denied to appellant the rental that the holder of a fixed income, leased line,

security is entitled to receive; at the same time, they denied him the right to an evaluation of his shares, based on the actual earnings of his company, that the holder of a common stock enjoys.

It is respectfully submitted that the Commission and the Court did not fully appreciate the dual characteristics of the "Alabama" and "Vicksburg" shares of Capital Stock owned by appellant.

Before the leases were made in 1925, the "Alabama" and "Vicksburg" shares of Capital Stock were ordinary shares of common stock. When these companies leased all of their assets to Illinois Central, it converted the common stockholders of "Alabama" and "Vicksburg" to guaranteed fixed income stockholders. Their shares of common stock had all of the characteristics of a long term non-callable bond superimposed on them by the execution of the leases. On and after the effective date of the leases, the "Alabama" and "Vicksburg" stockholders no longer shared in the profits and losses of their companies, but were entitled to receive, in lieu thereof, a fixed annual income of $6 and $5 a share until July 1, 2282. Appellant does not want to change this contract.

Appellant does contend that if the Commission and Illinois Central want to take these leases away from him, then his status reverts to that of a common stockholder, and appellant is no longer bound by the limitations of the lease that is being dissolved by the merger, and he is entitled to have his stock measured by its actual value—not by its value limited by the lease.

For this merger to be just and reasonable under the requirements of law and Section 5(2) of the Interstate Commerce Act, the Commission should impose the condition that Illinois Central perform all of its obligations

under the leases in full; not at any appraised or commuted values. Then, after Illinois Central has redeemed the leases by paying the full rental it owes of $1,942.50 for each share of "Alabama" and $1,618.75 for each share of "Vicksburg", the Commission should find the just and reasonable value, based on the actual earnings and assets, of the "Alabama" and "Vicksburg" companies.

Payment to the "Alabama" and "Vicksburg" stockholders of all their rent, plus the actual value of their companies, will constitute just and reasonable terms for this merger. Until Illinois Central does that, the mergers should be enjoined.

(3) The Questions Presented Are So Substantial as to Require Plenary Consideration.

Although this case is important to the parties, it is of importance far beyond its particular facts. What is involved here is the tremendously important principle of whether a railroad system can cancel its obligations under a long term lease by a merger. Can a corporation, which is liable as a tenant under a non-cancellable lease, force a substitution of its common stock, in exchange for the lease, by a merger?

If the Commission's action is approved, then a tenant railroad will receive legal sanction to wipe out a long term lease between it and its landlord, contrary to the landlord's contractual rights, merely by merging and substituting the tenant's common stock for the lease.

Under the authority of the Commission's ruling in this case, no guaranteed leased line stock has any stability. For example, the Pennsylvania Railroad could terminate its 900 year obligation under its lease with the United New Jersey Railroad & Canal Co. by merging, and paying the leased line stockholders the investment value of their $10 annual dividend, in Pennsylvania Railroad common stock or cash.

Another example is that the New York Central could wipe out the lease of the New York & Harlem Railroad stockholders by merging, and merely paying them the current capitalized value of the $5 guaranteed dividend, in common stock of New York Central, or in cash.

The Supreme Court should hear this case, with briefs on the merits and oral argument, for their resolution, to determine whether it is just and reasonable for the Interstate Commerce Commission to allow a railroad to break a lease, and to compel the stockholders of the landlord corporation to take the common stock of another railroad in exchange for the lease.

It is respectfully submitted that a plenary consideration of the basic question presented on this appeal, and a statement of this Court's position after such consideration, will avoid confusion and misunderstanding of the rights of guaranteed leased line stockholders, under their leases and shares of Capital Stock, in merger proceedings under Section 5(2) of the Interstate Commerce Act.

(g) The District Court Abused Its Discretion by Denying Appellant an Injunction Against the Mergers.

The District Court abused its discretion by denying appellant an injunction against the proposed mergers because the mergers deprived appellant of his clear legal rights. Appellant was entitled to an injunction to prevent a violation of the obligations of his contracts.

Appellant was also entitled to an injunction on the grounds that the terms of the mergers denied him the right of every corporation stockholder, whose stock is being taken away in a merger, to have his stock appraised on the basis of the actual earning power and actual value of his corporation.

The Commission never valued the "Alabama" and "Vicksburg" companies. All it did value was the income appellant was receiving under the leases.

Appellant was entitled to an injunction as a matter of right against such illegal conduct of the Commission, and the District Court abused its discretion in denying such injunction.

January 19, 1959

Respectfully submitted,

IRVING D. FRIEDMAN,
Appellant, *Pro Se*,
1501 Broadway,
New York 36, N. Y.

SOL FRIEDMAN,
1420 New York Avenue, N. W.,
Washington 5, D. C.

APPENDIX.

The Opinions Below.

IRVING D. FRIEDMAN, Plaintiff, *v.* UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

United States District Court, Southern District of New York. Civil Action No. 138-351. Opinion #24757.

Before: SWAN, Circuit Judge, and RYAN and HERLANDS, District Judges.

SWAN, Circuit Judge:

This suit comes before a three-judge district court pursuant to 28 U. S. C. A. §§1336, 1398, 2284, 2321-2325, and 5 U. S. C. A. §1009. It seeks to annul and set aside a report and order of the Interstate Commerce Commission dated April 14, 1958, 295 I. C. C. 731, which authorizes the mergers of The Alabama and Vicksburg Railway Company and the Vicksburg, Shreveport and Pacific Railway Company into the Illinois Central Railroad Company, and to enjoin enforcement of the order. For brevity the railroads will be referred to respectively as Alabama, Vicksburg and Illinois Central. The railroad corporations have been allowed to intervene as defendants. Plaintiff's application to the Commission for reconsideration of the report and order was denied by order dated September 29, 1958. Hence he had exhausted administrative remedies prior to filing the present suit in October, 1958. Joint answers to the complaint were filed by the United States and the Interstate Commerce Commission praying that the complaint be dismissed. The intervening railroads have also answered and asked for dismissal of the complaint.

The order under attack was issued pursuant to powers conferred upon the Commission by §5(2)(b) of the Interstate Commerce Act, as amended, 49 U. S. C. A. §5(2)(b), which authorizes the Commission to approve a merger of railroads which it finds "consistent with the public interest" on such terms as it finds "to be just and reasonable."

The proceedings before the Commission were initiated by the intervening railroads' applications for authority to merge. A public hearing was had at which the present plaintiff was heard in opposition to the railroads' application. A brief statement of the underlying facts will suffice. By lease dated March 31, 1925 Alabama, as lessor, leased its railroad to the Yazoo and Mississippi Valley Railroad Company, as lessee, for a term expiring July 1, 2282. The lessee covenanted to pay rent, which included (among other things), a sum equal to six per cent of the par value of the capital stock of the lessor outstanding on the date of the lease. By agreement between Alabama and Illinois Central the latter guaranteed payment by the lessee of all sums required to be paid by it under the aforesaid lease.[1] Illinois Central, as successor to the original lessee, is now operating the properties of Alabama and is subject to the obligations of the original lessee.

Plaintiff is a minority stockholder in both the Alabama and the Vicksburg companies and also claims to be a creditor of the Illinois Central.[2] His brief asserts that "By virtue of the leases, the Alabama and the Vicksburg stockholders became the landlord and creditor of the Illinois Central, in addition to retaining their rights and status as stockholders of their own companies." From this premise he argues (1) that the leases are legal impediments to a merger because the obligation of the Illinois Central to make rental payments until July 1, 2282 cannot legally be terminated by merger; (2) that the compensation of $155 per share for his Alabama stock and $126.50 per share for his Vicksburg stock, which he is offered under the terms of the merger, is an illegal confiscation of his property; and (3) that the Commission erred in not considering evidence of the values of the leased railroads.

[1] On the same date Vicksburg, as lessor, executed a similar lease, and Illinois Central gave a similar guaranty that a sum equal to five per cent of the par value of the lessor's outstanding capital stock would be paid. As the issues are the same under both leases, we shall discuss only the Alabama lease and guaranty.

[2] At the time of the order under attack plaintiff owned about one per cent of Alabama stock and one half per cent of Vicksburg stock.

Plaintiff's claim that he is a creditor of Illinois Central and is entitled to receive payments of $6 per year on each share of his Alabama stock, until July 1, 2282, is based on two theories: (1) that the lease bound the lessee to make to stockholders of Alabama annual payments of $6 per share until July 1, 2282, and (2) that Illinois Central contracted with Alabama's stockholders to make such payments by reason of endorsements on their stock certificates. Plaintiff is mistaken in thinking that the lessee entered into any contractual relationship with the lessor's stockholders. The terms of the lease are very specific in stating that the lessee's promises run only to the lessor. These specific provisions are set forth in the margin.[3] Section 1 of Article

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[3] Section 2 of Article Two reads as follows:

> "SECTION 2. The lessee covenants to and with the lessor to pay yearly and every year during the existence of this lease, and for any part of a year in proportion, the following amounts:
>
> * * * * * *
>
> (g) To the lessor a sum semi-annually, on the first day of April and October of each year during the term of this lease, equal to six per cent (6%) of the par value of the present outstanding capital stock of the Lessor, * * *
>
> It is agreed that said semi-annual payments, or any of them, must be made to the Lessor, if it so instructs the Lessee by timely notice in writing, but, in the absence of such instruction from the Lessor, the Lessee may make said semi-annual payments either to the Lessor or directly to the stockholders of record of the Lessor, as the Lessee may, from time to time, and at any time, elect. Any such payments made to the stockholders shall be in the proportion of their respective holdings of shares, and in case of such payment directly to the stockholders, evidence of the payment shall be preserved by the Lessee and furnished to the Lessor whenever the same shall be requested."

Section 1 of Article Nine, reads as follows:

> "Nothing in this Indenture, expressed or implied, is intended or shall be construed to give to any person or corporation other than the parties hereto, their successors and assigns, any legal or equitable right, remedy or claim under or in respect of this Indenture or under any covenant, condition or provision herein contained or the guaranty thereof; all the covenants, conditions and provisions herein and in the said guaranty being intended to be and being

Nine makes it perfectly clear that the stockholders of Alabama are neither third-party beneficiaries nor donee beneficiaries of the lessee's promises to the lessor. Section 2 of Article Nine makes equally clear that the lease does not preclude a transfer by merger or sale of the railway and properties of the lessor.

Plaintiff also relies upon the legend endorsed upon his stock certificates as giving him a contractual right against Illinois Central. In this also he is mistaken. The final sentence of the endorsement shows plainly that the obligations of the lessee and guarantor are those expressed in the lease and guaranty, to copies of which the certificate holder is referred for ascertainment of his rights.[4]

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for the sole and exclusive benefit of the parties hereto, their successors and assigns."

Section 2 of Article Nine, reads as follows:

"SECTION 2. Nothing contained in this Indenture shall prevent the transfer by * * * merger with or sale to the Lessee, its successors or assigns, of the railway and properties of the Lessor, or any * * * merger of the Lessee with any other corporation or corporations; * * *. But in case of any such * * * merger * * * (except * * * between the Lessor and the Lessee, its successors or assigns, or between the Lessor and said Guarantor, its successors or assigns), proper provisions shall be embodied in any instrument or instruments effecting the same for the preservation and maintenance of the rental to be paid by the Lessee, its successors or assigns, to the Lessor, as herein provided, * * *."

[4] The complete endorsement reads as follows:

"By an Indenture of lease bearing date the 31st day of March, 1925, and approved by the Interstate Commerce Commission on the 3d day of May, 1926, The Alabama and Vicksburg Railway Company as Lessor, has leased its railroad and the appurtenances thereof and certain other property to The Yazoo and Mississippi Valley Railroad Company, as Lessee, from the day of the approval of the said lease by the Interstate Commerce Commission until the first day of July, 2282, and for such further term for which said lease may be extended as provided therein; and as rental therefor the Lessee has covenanted to pay (inter alia) on the 1st day of April and the 1st day of October in each year during said term, a sum equal to six per cent. (6%) of the par value of the Capital stock of the Lessor issued and

Plaintiff's claim that the Illinois Central is under any contractual duty to him cannot be sustained. His reliance on such cases as *King* v. *Richardson*, 4 Cir. 136 F. 2d 849, cert. den. 320 U. S. 777, to the effect that "merger will not be applied where its effect would be to prejudice the rights of innocent third persons," is misplaced. Much closer in point is *Flagg* v. *Manhattan Ry. Co.*, (C. C. S. D. N. Y.) 10 F. 413.

Plaintiff's second contention which relates to the valuation of his shares of stock is also not sustainable. Because of the broad authority conferred upon the Commission by §5 of the Interstate Commerce Act and the technical complexities of a merger case, the doctrine of administrative finality is particularly applicable. In *McLean Trucking Co.* v. *United States*, 321 U. S. 67, the court approved an order of the Commission under §5, the opinion stating at page 87:

> "* * * Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. * * * 'The wisdom and experience of that Commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' * * * If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are ade-

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outstanding on March 31, 1925; being the equivalent of three per cent. (3%) semi-annually on the amount of said stock now outstanding, to wit: $4,200,000. par value thereof. By an agreement bearing date the 31st day of March, 1925, and approved by the Interstate Commerce Commission on the 3d day of May, 1926, between Illinois Central Railroad Company, and said The Alabama and Vicksburg Railway Company, said Illinois Central Railroad Company has unconditionally guaranteed the due and punctual payment by said Lessee of all sums required to be paid by it under the terms and provisions of said Indenture. For full and more definite statement of the obligations of the Lessee and guarantor, respectively, in the respects above noted, reference is made to the said lease and guaranty copies of which are on file in the office of the Transfer Agent."

quate and supported by evidence, it is not our function to upset its order."[5]

In approving a voluntary merger the Commission must find, first, that it "will be consistent with the public interest"; second, that it is "just and reasonable." See *Schwabacker (sic.) v. United States*, 334 U. S. 182, 194. With respect to the meaning of "just and reasonable" the court said at page 199:

> "* * * In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter [of the state of incorporation] made to him but the current worth of that promise that governs. it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good."

In the case at bar the Commission made an appraisal of what plaintiff is contributing to the merger. Its report states:

> "Upon consideration of all the evidence we are of the opinion and find that the fair values of the considered stocks do not exceed amounts which would be produced by capitalizing the respective dividends at a rate between 4.25 and 4.50 per cent. Capitalizing the dividends at the lower of these rates would produce $141.18 per share for the Alabama stock and $117.65 per share for the Vicksburg stock. However, to avoid any possibility of injustice to the minority stockholders and to afford the present holders of these stocks the same prices which we have heretofore authorized Illinois Central to pay, and in view of the latter's willingness to pay the larger amounts or to exchange its stock upon the basis of the indicated prices, we are of the opinion

[5] See also *Stott et al v. United States et al*, (S. D. N. Y. Oct. 8, 1958) and authorities cited at page 10 of the opinion; *O. C. Wiley & Sons v. United States*, (W. D. Va.) 85 F. Supp. 842, 844, affirmed 338 U. S. 902.

> that it will be consistent with the public interest to approve the merger upon the terms proposed, and that under these terms the holders of the leased lines' stocks will receive the fair economic equivalent of the rights surrendered by them."

Plaintiff contends that the Commission has no authority in law to capitalize the contractual liability of Illinois Central to pay at the rate of $6 and $5 a year, per share, until July 1, 2282. But as we have previously demonstrated Illinois Central is under no such contractual liability to plaintiff. The Commission's capitalization of the present value of future rental payments is generous, and is amply supported by the evidence.

Plaintiff's third contention requires little discussion. Before the hearing examiner plaintiff moved to require the railroad applicants to furnish a statement segregating the traffic revenues derived from operation of the leased properties, in order to determine the value of his stocks from the standpoint of earnings contributed to Illinois Central. The examiner denied the motion and his ruling was sustained, the Commission citing its prior decision, *Delaware L. & W. Co. Merger*, 257 I. C. C. 91, to the effect that where a lease in perpetuity is involved, which for practical purposes the present is, the rental represents the earnings of the property so far as the stockholders of the leased lines are concerned. Plaintiff now urges that the absence of evidence of the earning power and values of the leased lines makes it impossible to ascertain the value of the stock of Alabama and Vicksburg.[6] Plaintiff's argument lacks merit. We agree with the Commission's statement that "For all practical purposes, the stocks of the leased lines have a value to their owners measurable solely by the fixed rental payable under the leases and the divi-

[6] The brief of the United States and the Interstate Commerce Commission contends that plaintiff is precluded from raising this point because he failed to include it in his petition for reconsideration. It is unnecessary to pass on this contention.

dends payable therefrom on the stocks." Plaintiff as a stockholder in Alabama and Vicksburg may have an interest in their separate earning power in 2282, if the leases are not renewed, but at present his only ascertainable interest is in the rental they produce. As said in *Old Colony R. Co.* v. *New York, N. H. & H. R. Co.*, 2 Cir. 98 F. 2d 670, 672 "* * * it is a fanciful notion that one may forecast the future value of a railroad half a century hence."

We find no basis for setting aside the report and order attacked by the complaint. Consequently the complaint should be dismissed. It is so ordered.

THOMAS W. SWAN
Circuit Judge

SYLVESTER J. RYAN
District Judge

WILLIAM B. HERLANDS
District Judge

Judgment entered December 23rd, 1958.

HERBERT A. CHARLSON,
Clerk.

[SEAL]

The Report of the Interstate Commerce Commission is dated April 14, 1958, and it is reported as "Illinois Central Railroad Company—Merger—Alabama & Vicksburg Railway Company", at 295 I. C. C. 731. It is attached to the Complaint, which is in the record.

FILE COPY

FILED
FEB 14 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 675

IRVING D. FRIEDMAN,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of New York

MOTION OF RAILROAD APPELLEES TO AFFIRM

FREDERIC A. COLLINS,
DONALD L. WALLACE,
120 Broadway,
New York 5, New York,
Counsel for Railroad Appellees

JOSEPH H. WRIGHT,
ERLE J. ZOLL, JR.,
135 East Eleventh Place,
Chicago 5, Illinois,
Of Counsel.

McCORMICK & HENDERSON, INC., CHICAGO, ILL.

IN THE

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IRVING D. FRIEDMAN,

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

Appeal from the United States District Court
for the Southern District of New York

MOTION OF RAILROAD APPELLEES TO AFFIRM

Appellees Illinois Central Railroad Company, The Alabama and Vicksburg Railway Company, and Vicksburg, Shreveport & Pacific Railway Company,* pursuant to Rule 16, paragraph 1, of the Revised Rules of the Supreme Court of the United States, hereby move that the order of the three-judge District Court be affirmed.

*Hereafter called "Illinois Central," "Alabama," and "Vicksburg," respectively.

This is a direct appeal from the final judgment entered December 23, 1958, by a District Court of three judges specially constituted pursuant to 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325, and 5 U.S.C. §1009, dismissing appellant's complaint which sought to set aside an order of the Interstate Commerce Commission. Notice of appeal was filed December 26, 1958, and the case was docketed in this Court January 29, 1959.

The issue in this appeal is the validity of the Commission's order of April 14, 1958, in *Illinois Central Railroad Company—Merger—Alabama & Vicksburg Railway Company, Etc.*, Finance Docket No. 19677, and *Illinois Central Railroad Company—Merger—Vicksburg, Shreveport & Pacific Railway Company, Etc.*, Finance Docket No. 19678. These cases were heard by the Commission on separate records, but were disposed of by a single report and order, which are attached as Exhibit A to the complaint filed in the District Court. The Commission's decision is reported as *Illinois Central R. Co. Merger*, 295 I.C.C. 731. The Commission's order approves and authorizes—

> "mergers of the properties of The Alabama and Vicksburg Railway Company and the Vicksburg, Shreveport & Pacific Railway Company into the Illinois Central Railroad Company for ownership and continued management and operation, upon the terms and conditions in said report found just and reasonable."

Pursuant to previous Commission authorization, the Illinois Central has for some years owned a majority of the capital stock of both the Alabama and the Vicksburg, and has controlled and operated those lines, as integral parts of its own operations, under leases which expire July 1, 2282. By the terms of these leases the Illinois Central pays to each lessor, as rental, a sum not exceeding

$5,000.00 a year, equal to the reasonable corporate expenses of each lessor; all taxes on the leased properties; the interest on each lessor's funded debt; and an amount equal to $6.00 per share on the outstanding stock of the Alabama and $5.00 per share on the outstanding stock of the Vicksburg.

On January 16, 1957, the Illinois Central, Alabama, and Vicksburg executed agreements providing for the merger of the Alabama and the Vicksburg into the Illinois Central. Under these agreements, which are to become effective only upon approval of the Interstate Commerce Commission, the stock of the Alabama and the Vicksburg is to be exchanged for cash or Illinois Central stock on the basis of $155.00 per share for Alabama stock and $126.50 per share for Vicksburg stock.

On February 21, 1957, applications for authority to merge were filed with the Commission. Hearings on the applications were held before a Hearing Examiner, briefs were filed, a proposed report was served upon the parties by the Examiner, exceptions thereto were filed by the present appellant to which these present appellees replied, and the cases were thereafter orally argued before Division 4 of the Commission. By report and order dated April 14, 1958, the Commission, by Division 4, approved the terms of the proposed mergers, subject to conditions not here relevant. The present appellant filed a petition for reconsideration which was denied by the entire Commission.* Appellant then filed suit in the court below,

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*At the time of the order under attack appellant owned about one per cent of Alabama's outstanding stock and one half per cent of Vicksburg's outstanding stock.

which heard arguments December 8, 1958, and which on December 23, 1958, filed its opinion and entered judgment dismissing the complaint.

Appellant's Jurisdictional Statement indicates substantial agreement with the statement made in the District Court's opinion that this case involves three questions: (1) are the leases legal impediments to a merger; (2) is the compensation of $155.00 per share for appellant's Alabama stock and $126.50 per share for appellant's Vicksburg stock, which he is offered under the terms of the mergers, an illegal confiscation of appellant's property; and (3) did the Commission err in not considering evidence of the values of the leased railroads.

It is submitted that the answers to these questions are so obvious that the order of the District Court should be affirmed without argument.

1. The Leases Are Not Legal Impediments to the Mergers

Appellant's principal contention is that under the leases of the Alabama and the Vicksburg, and under the endorsements on the Alabama and the Vicksburg stock certificates, annual $6.00 and $5.00 dividends are due and owing to him as a stockholder of Alabama and of Vicksburg. He claims that the leases and endorsements constitute "contracts" with him, that the Illinois Central has an obligation to pay such sums, not to the lessors as rental, but to him as dividends, for the duration of the leases, that he therefore has the status of a "landlord and creditor" of the Illinois Central, and that "the Commission committed error by authorizing the leases to be cancelled, depriving the Alabama and the Vicksburg leased line stockholders of their $6.00 and $5.00 annual payments, which they had a right to receive for the next 323 years." He asserts that the Illinois Central's obligation under the

leases and its guarantees to make payments of a sum equal to $6.00 and $5.00 per share on the outstanding stock of the Alabama and the Vicksburg, respectively, run to him as a stockholder.

This argument is without foundation. It is not possible to state the matter any more clearly and succinctly than did the District Court, and we respectfully refer the Court to that part of the District Court's opinion appearing at pages 20-22 of appellant's Jurisdictional Statement. It is a complete answer to appellant's argument.

The mergers are not "a device to break a long-term lease," as the Jurisdictional Statement contends. There is no "breach of contract." The lessee's promises run only to the lessors, not to the lessors' stockholders. The stockholders are neither third-party beneficiaries nor donee beneficiaries of the lessee's promises to the lessors. Appellant's claim that the Illinois Central is under any contractual duty to him cannot be sustained.

Moreover, Article Nine, Section 2, of each lease specifically permits the merger of the lessor and the lessee, and provides for the cessation of rental payments under the lease in case of such merger. Appellant's claim that the leases are legal impediments to the mergers is wholly without foundation.

2. The Mergers Would Not Constitute an Illegal Confiscation of Appellant's Property.

Appellant's second point is a corollary of his first. He claims that the lessors and the lessee have no right to terminate the leases because the lessors then would receive less than the total amount of the rental required to be paid over the term of the leases. He says, "Ap-

pellant should receive payment in full of all the rental he is entitled to under the leases, owed to him by Illinois Central." (Jurisdictional Statement, page 12.)

The answer to this argument, again, is that appellant is not a party to either lease and the lessee's obligations run only to the lessors. There is no obligation on the lessee's part to pay anything to appellant. No rights of appellant are being terminated by the merger agreements. As is made clear in the next section of this Motion, under the terms of the mergers appellant will receive the present worth of the stock which he is contributing to the mergers. Appellant's second point is untenable.

3. The Commission Did Not Err in Not Considering Evidence of the Values of the Leased Railroads.

Appellant also argues that—

> "Earning power is the proper standard to use to determine the value of a stock. The Commission did not examine the earning power and values of the 'Alabama' and 'Vicksburg' companies. There is no evidence whatever in the record of the earning power and values of the 'Alabama' and 'Vicksburg' companies, which are being absorbed in this merger. It is therefore impossible to ascertain what they are worth." (Jurisdictional Statement, page 12.)

This argument is contrary to what appellant stated to the District Court. There, he agreed that under the merger agreements he would receive what his stock was worth. The relevant portion of his argument follows:

> "Mr. Friedman: • • • Another reason this merger is contrary to law is that you can't reduce obligations and liabilities by merging. The Illinois Central owes me a contract to pay me $6 a year and $5 a year for

325 years. They have got to owe me the same contract after the merger that they owed me before the merger. They say and they brought witnesses to testify before the Commission that all this type of security is worth is no more than $155 and $126.50 they are willing to pay.

"Judge Swan: Its present worth would be discounted, I suppose.

"Mr. Friedman: *Yes, I agree with them that that is what its present worth is.* In fact, the witnesses before the Commission—

"Judge Ryan: What did you say there? You agree with what?

"Mr. Friedman: *I agree that the prices they want to pay are what the securities are worth,* but I say—

"Judge Ryan: Then how have you been damaged or injured if you make that statement?

"Mr. Friedman: I have been damaged or injured because they have no right to pay me off at what it is worth. In a merger you have to pay or assume liabilities. You can't pay what they are worth." (Transcript of Argument before District Court, pages 12-13. Italics added.)

"Mr. Friedman: * * * I say it is absolutely irrelevant what it is worth. This can be worth $50 or $5,000; they have no right under the law to pay me what it is worth. They have got to pay me what it amounts to. This lease is an obligation that the Illinois Central must first redeem and pay off in full. After the lease is redeemed and terminated, then they can apply to merge.

"But while they owe me the lease and this contract for the payment of fixed dividend for 325 years, that is a legal impediment to a merger.

"Judge Swan: The whole issue, then, really, is whether they do owe you that money, isn't it?

"Mr. Friedman: That is the issue as to whether I am a creditor to whom they owe that money and I say that issue is clear as a matter of law, they do and they have no right to pay me what it is worth. There

is no issue of fact here. *I agree with them what they are worth.*" (*Ibid.*, pages 14-15. Italics added.)

"Mr. Friedman: * * * My contract amounts to this 325 year lease and they have to pay or assume the payment of that lease. What it is worth is completely immaterial in this proceeding and that is where the Commission committed error and I ask you to reverse them." (*Ibid.*, page 19.)

Since appellant agrees that under the merger agreements approved by the Commission he will receive for his stock of each lessor what that stock is worth, the Commission clearly did not err in not considering evidence as to the values of the lessors. Such evidence would not have been relevant in determining whether appellant would receive a "fair economic equivalent" for his stock. *Schwabacher* v. *United States*, 334 U.S. 182, 200.

Appellant's argument is unsound for another reason. As the Commission pointed out in its report, since the Alabama and the Vicksburg have been leased virtually in perpetuity to the Illinois Central for a fixed rental, their stockholders no longer have an interest in the degree to which those companies contribute revenue to the Illinois Central. Regardless of the measure of those revenues, the stock of the lessor companies has a value to whoever owns it measurable solely by the payments made to the companies by the lessee. Those payments do constitute the earnings and revenues of the Alabama and the Vicksburg. The "value" of the companies has no bearing on the worth of the stock. This was the holding also of the District Court, which said:

"Plaintiff as a stockholder in Alabama and Vicksburg may have an interest in their separate earning power in 2282, if the leases are not renewed, but at present his only ascertainable interest is in the rental

they produce. As said in *Old Colony R. Co.* v. *New York, N. H. & H. R. Co.*, 2 Cir. 98 F. 2d 670, 672, '• • • it is a fanciful notion that one may forecast the future value of a railroad half a century hence.' "

Appellant's final point, like his others, is without foundation.

CONCLUSION.

For the foregoing reasons it is clear that this appeal presents no substantial questions. It is therefore respectfully submitted that the order of the District Court dismissing the complaint should be affirmed.

FREDERIC A. COLLINS,
DONALD L. WALLACE,
120 Broadway,
New York 5, New York.
Counsel for Railroad Appellees.

JOSEPH H. WRIGHT,
ERLE J. ZOLL, JR.,
135 East Eleventh Place,
Chicago 5, Illinois.
Of Counsel.

INDEX

	Page
Statement	1
Argument	3
Conclusion	7
Appendix	8

CITATIONS

Cases:

Alabama & V. Ry. Co. Control, 290 I.C.C. 36	2
Connecticut Ry. & Lighting Co. v. *Palmer*, 109 F. 2d 568, affirmed, 311 U.S. 544	6
Control of A. & V. Ry. and V.,S. & P. Ry., 111 I.C.C. 161	2
Illinois Central R. Co. Merger, 295 I.C.C. 731	2
Schwabacher v. *United States*, 334 U.S. 182	4
United States v. *Hancock Truck Lines*, 324 U.S. 774	6
United States v. *Tucker Truck Lines*, 344 U.S. 33	6
Vicksburg, S. & P. Ry. Co. Control, 290 I.C.C. 808	2

Statutes:

Interstate Commerce Act 24 Stat. 379, as amended, 49 U.S.C. 1, *et seq.*:	
Sec. 5	3, 4
Sec. 5(2)	3
Sec. 5(11)	4

Miscellaneous:

Revised Rules of the Supreme Court:	
Rule 16, par. 1(c)	1

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 675

IRVING D. FRIEDMAN, APPELLANT

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from the United States District Court for the Southern District of New York

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on December 23, 1958, by a three-judge district court convened under 28 U.S.C. 2284 and 2325, dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order authorized the merger of the

Alabama and Vicksburg Railway Company (Alabama) and Vicksburg, Shreveport and Pacific Railway Company (Vicksburg) into the Illinois Central Railroad Company. *Illinois Central R. Co. Merger*, 295 I.C.C. 731. Inasmuch as the Jurisdictional Statement does not contain the Commission's report, it is attached hereto as an appendix, *infra*, pp. 8-26.

The Alabama and the Vicksburg companies are operated by the Illinois Central under leases between the corporations expiring July 1, 2282. There is an outstanding option to extend the term of each lease up to a maximum period of 999 years from 2282. *Control of A. & V. Ry. and V., S. & P. Ry.*, 111 I.C.C. 161, 165-166. Both companies are operated as integral parts of the Illinois Central system. Under the leases, the Illinois Central pays the lessors' ("Alabama" and "Vicksburg") corporate expenses not exceeding $5,000 a year, all taxes on the leased properties, interest on lessors' outstanding bonds, and annually an amount equal to 6% of the par value of the capital stock of the Alabama and 5% of the Vicksburg stock. The Illinois Central owns, through a wholly owned subsidiary, 92% of the capital stock of the Alabama, and 93.52% and 92.80% of the common and preferred stock, respectively, of the Vicksburg. These acquisitions of control were approved and authorized by the Commission in 1953. *Alabama & V. Ry. Co. Control*, 290 I.C.C. 36; *Vicksburg, S. & P. Ry. Co. Control*, 290 I.C.C. 808.

On January 16, 1957, agreements were entered into providing for merging the Alabama and the Vicksburg into the Illinois Central, with the latter

being the sole surviving corporation. The Illinois Central would assume all obligations of the Alabama and the Vicksburg, and in turn it would receive all property and interests of the other two. Furthermore, the agreement provides that on the merger date the capital stock of the nonsurviving lines will be converted into common stock of the Illinois Central at prices of $155 per share for Alabama stock, and $126.50 per share for Vicksburg stock, both common and preferred. At their option, the stockholders of the Alabama and the Vicksburg are entitled to receive the authorized price in cash plus dividends due up to the merger date. Other details of the merger agreements are not presently pertinent.

The merger agreements were approved by stockholders of 93.81% of the total outstanding shares of the Alabama stock, 95.30% of the Vicksburg stock, and 85.70% of the Illinois Central stock. Appellant is a dissenting minority stockholder of the Alabama and of the Vicksburg companies.

After appropriate administrative proceedings under Section 5(2) of the Interstate Commerce Act, during which appellant and others appeared and intervened in opposition to the mergers, the Commission on April 14, 1958, issued its report and order authorizing the mergers (App. *infra*, p. 8).

The district court unanimously sustained the Commission's decision.

ARGUMENT

Section 5 of the Interstate Commerce Act (49 U.S.C. 5) empowers the Commission to approve a

voluntary merger of railroads upon finding, first, that the transaction "will be consistent with the public interest," [1] and, secondly, that the terms and conditions of the merger are "just and reasonable." The jurisdiction of the Commission under Section 5 is made plenary and exclusive, and independent of all other State and Federal authority.[2] The rights of stockholders in the merged railroads are governed by *Schwabacher* v. *United States*, 334 U.S. 182, 199, where this Court held:

> In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good.

Appellant does not deny that the Commission applied the *Schwabacher* rule in this case. It did so by capitalizing, in terms of the current yield on comparable securities, the dividends payable under the leases to the Alabama and Vicksburg stockholders. As the district court found, "The Commission's capitalization of the present value of future rental payments

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[1] No attack is made here as to the validity of the Commission's determination that the mergers will be consistent with the public interest.

[2] Section 5(11) provides: "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power * * * to carry such transaction into effect * * *."

is generous, and is amply supported by the evidence" (J. St. 24).

1. Appellant challenges the propriety of *any* present capitalization of future rental payments, on the theory that the leases are legal impediments to the mergers. (J. St. 9). He maintains that by virtue of his being a stockholder of the lessor corporations, he is a creditor of, and has a contractual relationship with, the Illinois Central. The terms of the leases themselves refute this contention.[3] Moreover, such a contention is untenable because it ignores the essential distinction between a corporation and one of its stockholders. The leases were, of course, entered into between the lessor corporations and the lessee, Illinois Central. The district court stated (J. St. 20-21):

> The terms of the lease are very specific in stating that the lessee's promises run only to the lessor. * * * Section 1 of Article Nine makes it perfectly clear that the stockholders of Alabama are neither third-party beneficiaries nor donee beneficiaries of the lessee's promises to the lessor. Section 2 of Article Nine makes equally clear that the lease does not preclude a transfer by merger or sale of the railway and properties of the lessor.

It is manifest that the leases express no intent that the specified rental payments shall survive mergers of the lessors with the lessee, and the very terms of

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[3] The leases appear in the record at pp. 413-534. See also provisions of the lease of the Alabama quoted in footnote 3 of the district court's opinion (J. St. 20-22).

the leases are dispositive of appellant's claim that the leases bar the mergers.

2. Appellant further contends that the Commission erred in not considering the current earning power of the Alabama and the Vicksburg lines, in appraising the value of his stock (J. St. 11). We submit that this point is not subject to judicial review because appellant failed to present it in his petition for reconsideration before the Commission. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37; and *United States* v. *Hancock Truck Lines*, 324 U.S. 774, 778 and 779-780.

In any event, the Commission correctly determined that the current or future earning power of the leased properties was irrelevant in view of the duration of the leases. Inchoate interests arising upon expiration of the leases are pertinent only insofar as they affect current value, and it is clear that prospective earning power of stock in 2282 A.D., or later, is no gauge of the current value of the stock. It is necessary to differentiate between present value and prospective value hundreds of years from now. Appellant may have an interest in the separate "earning power" of the Alabama and of the Vicksburg in 2282 A.D. if the leases should not then be renewed, but today his only ascertainable interest is in the rent paid in the form of dividends. As was aptly stated in *Connecticut Ry. & Lighting Co.* v. *Palmer*, 109 F. 2d 568, 570 (C.A. 2), affirmed 311 U.S. 544: "The remainder of the lease covers a span longer than from the battle of Hastings to the present day. To try to forecast events for even a tenth of that futurity would appall the boldest prophet."

We submit that the Commission correctly determined that, under the leases, the rentals represent the earning power of the property as far as the stockholders of the leased lines are concerned, and that the merger terms provide for the stockholders the full equivalent of the rentals payable under the leases.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

FEBRUARY 1959.

APPENDIX

F-9026

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 19677 [1]

ILLINOIS CENTRAL RAILROAD COMPANY MERGER, ALABAMA & VICKSBURG RAILWAY COMPANY, ETC.

Decided April 14, 1958

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* * * *

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MITCHELL, ARPAIA, AND MCPHERSON

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed, and the case has been argued orally.

The Illinois Central Railroad Company and The Alabama and Vicksburg Railway Company, common carriers by railroad subject to the provisions of part I of the Interstate Commerce Act, hereinafter referred to as the Illinois Central and the Alabama, respectively, on February 21, 1957, applied for authority (1) under section 5 (2) of the Interstate Commerce Act, as amended, to merge the properties and franchises of the Alabama into the Illinois Cen-

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[1] This report also embraces Finance Docket No. 19678, Illinois Central Railroad Company—Merger—Vicksburg, Shreveport & Pacific Railroad Company, Etc.

tral for ownership, management, and operation, and (2) under section 20a of the act to the Illinois Central (*a*) to issue whatever number of shares of its capital stock that may be required to be delivered in exchange for capital stock of the Alabama, as hereinafter stated, and (*b*), as the successor company, to assume obligation and liability with respect to the securities of the Alabama, Finance Docket No. 19677. On the same date the Illinois Central and the Vicksburg, Shreveport & Pacific Railway Company, also a common carrier subject to part I of the act, hereinafter referred to as the Vicksburg, applied for authority (1) under section 5 (2) to merge the properties and franchises of the Vicksburg into the Illinois Central for ownership, management, and operation, and (2) under section 20a of the act to the Illinois Central (*a*) to issue whatever number of shares of its capital stock that may be required to be delivered in exchange for capital stock of the Vicksburg, as hereinafter explained, and (*b*), as the successor company, to assume obligation and liability with respect to the securities of the Vicksburg, Finance Docket No. 19678. No representations have been made by any State authority. Minority stockholders of the Alabama and the Vicksburg intervened in opposition to the applications, and hearings were held on June 18-19, 1957. Briefs have been filed.

The Illinois Central is an Illinois corporation. It has outstanding 3,103,348 shares of common stock without par value of an aggregate stated value of $155,185,951. The company operates lines of railroad in Illinois, Indiana, and other States. It also operates the properties of the Alabama and the Vicksburg under leases expiring July 1, 2282. See *Alabama & V. Ry Co. and Vicksburg, S. & P. Ry Co. Control*, 111 I. C. C. 161, and Finance Docket No.

15105, *Illinois Central R. Co. Purchase*, 261 I. C. C. 822 (not printed in full), decided December 13, 1945. The rentals under the leases consist of payments of lessors' corporate expenses not exceeding $5,000 a year, all taxes on the leased properties, interest on lessors' outstanding bonds, and annual dividends at the rate of 6 percent on the capital stock of the Alabama and 5 percent on the Vicksburg stock.

The Alabama was incorporated under the laws of Mississippi in 1889. It has outstanding 42,000 shares of capital stock of the par value of $100 a share, of which, at the time of the hearing, 38,724 shares, or 92 percent, were owned by the Mississippi Valley Corporation, hereinafter called the Mississippi Valley, a wholy owned subsidiary of the Illinois Central. The remaining shares were in the hands of the public. Each share is entitled to one vote. Other security holders have no voting rights. Acquisition of control by the Mississippi Valley was approved and authorized in *Alabama & V. Ry. Co. Control*, 290 I. C. C. 36, decided August 4, 1953. The Alabama does not control any corporation. Its line of railroad extends from Meridian to Vicksburg, Miss., 140.71 miles.

The Vicksburg is a Louisiana corporation, incorporated in 1901. Its outstanding capital stock consists of 28,565 shares of common and 21,428 shares of preferred, of the par value of $100 a share for each class of stock. At the time of the hearing, the Mississippi Valley owned 26,713 shares, or 93.52 percent, of the common stock, and 19,886 shares, or 92.80 percent, of the preferred stock. Each share of both classes of stock is entitled to one vote. Acquisition of control by the Mississippi Valley through stock ownership was approved and authorized in Finance Docket No. 18263, *Vicksburg, S. & P. Ry. Co. Control*, 290 I. C. C. 808 (not printed in full), decided October 6,

1953. The Vicksburg does not control any corporation. Its line of railroad extends from Delta Point (or the west bank of the Mississippi River opposite Vicksburg), to Shreveport, La., 169.62 miles, and from Shreveport to Jewella, La., 3.02 miles.

The applicants propose to effectuate the mergers under the terms and conditions of agreements dated January 16, 1957, providing, among other things, that the Alabama and the Vicksburg, hereinafter referred to collectively as the leased lines, will be merged into the Illinois Central, which will be the surviving corporation; that the corporate existence of the leased lines will cease upon the date of merger, except as may be otherwise provided by law; that upon the merger date all property and any other rights and interests whatsoever of the leased lines will be automatically conveyed to and vested in Illinois Central without any act or deed and that the Illinois Central will assume all obligations, liabilities, and duties of the leased lines; that on the merger date the capital stock of the leased lines will be converted into common stock of the Illinois Central at prices of $155 per share for Alabama stock, $126.50 per share for Vicksburg stock, both common and preferred, and at the New York Stock Exchange closing price on the effective date of the merger for Illinois Central stock; that, in lieu of shares of Illinois Central stock, stockholders of leased lines will, at their option, be entitled to receive the authorized price in cash plus a dividend of 6 percent per annum in the case of the Alabama and 5 percent in the case of the Vicksburg for each full month from the last dividend-payment date to the date of the merger; that after the merger date there will be no further issue or transfer of certificates of stock of the leased lines and that, as such certificates are presented to the Illinois

Central, they will be canceled and certicates of Illinois Central stock will be issued in exchange therefor in accordance with the terms and conditions of the merger agreements; that, if a different price for the stocks is approved by us than that specified in the agreements, the merger will not become effective except upon the approval of the directors of the Illinois Central and the leased lines; and that the merger agreements will become effective on the date, heretofore referred to as the merger date, when such agreements are filed and recorded in the office of the secretary of state of Illinois, a counterpart of one or the other agreement, as the case may be, having been theretofore filed in the proper office of the States of Mississippi and Louisiana.

The merger agreements have been approved by stockholders of 93.81 percent of the total outstanding shares of the Alabama stock, 95.30 percent of the Vicksburg stock, and 85.70 percent of the Illinois Central stock.

The agreed prices for the leased lines' stock could not have been arrived at as a result of negotiations among the parties, as the Illinois Central, in effect, acted in the dual capacity of buyer and seller. Nevertheless, the prices are considered fair and adequate to both sides by the officers of the Illinois Central, particularly in view of the fact that such prices represent the maximum prices authorized by us in connection with the acquisition by the Illinois Central of control of the leased lines.

A vice president and director of Halsey, Stuart & Co., Inc., who testified in behalf of applicants and is a specialist in railroad securities, expressed the opinion that the proper interest rate on which to compute the value of the leased lines' stocks, based upon pres-

ent return, is not less than 5 percent. On this basis, the Alabama stock would be worth $120 a share and the Vicksburg stock $100 a share. His opinion was based largely on investment values and yields on comparable securities. The witness referred to similar securities (such as stocks of the Northern Central Railway Company leased to The Pennsylvania Railroad Company, the Mahoning Coal Railroad Company leased to the New York Central Railroad Company, and the Delaware & Bound Brook Railroad Company leased to the Reading Company), rated equally as high or higher, which had an average yield as of June 3, 1957, of 4.97 percent at the offering price, as compared to yields of 3.87 percent on the Alabama stock and 3.95 percent on the Vicksburg stock. In further support of his opinion, he submitted a representative list of recent offerings of municipal and State tax-exempt general obligations and revenue bonds yielding an average return of 3.75 percent in maturities of 20 to 25 years, or equal to a 5-percent taxable return for individuals in the 25-percent bracket and about 10 percent for those in the 50-percent bracket; and also a list of securities of public utilities, including Metropolitan Edison Co., New York Telephone Co., and Boston Edison, all rated class A or higher by Standard & Poor's Railroad Securities, yielding 4.78 to 5.11 percent, as well as other lists of railroad-equipment issues and other rail issues yielding not less than 4 percent. The leased lines' stocks are rated class A in Standard & Poor's, or one rating or more below some equipment-trust certificates of various carriers.

Two other specialists in railroad securities, one employed by the investment banking firm of Kuhn, Loeb & Co., and the other by Harriman, Ripley & Co., Inc., both New York City firms, also testified

with respect to the fairness of the exchange ratio. Based largely on their appraisal of investment values and the yields on comparable securities, as in the case of the previous witness, and considering ratings by Moody's Investors Service and Standard & Poor's, they also concluded that a price which would result in a yield of approximately 5 percent would be a fair basis for evaluation of the stocks of the leased lines. In arriving at their conclusions, these witnesses gave consideration to other factors, such as dependency on the financial strength of Illinois Central for continuity of the dividends, the importance to Illinois Central of the leased lines, the terms of the securities of the leased lines, and of the lease, density of traffic, and location of the properties involved.

A witness for the Illinois Central estimated at the hearing that applicants' proposal would require a maximum issue of 233,348 shares to effect the stock exchange, on the basis of $55 a share for Illinois Central stock. The stock market price, however, has dropped considerably since. On the basis of $30 a share for Illinois Central stock, it would require an issue not in excess of 427,603 shares. Illinois Central will be authorized to issue not in excess of 430,000 shares to provide for market variations. The actual number of shares required to be issued will depend upon the number of shares offered for exchange and the market price of the Illinois Central stock on the date of the merger. The shares that would be received by the Mississippi Valley for its 92- or 93-percent stockholdings are to be canceled upon consummation of the merger. The stock issued to minority stockholders will result in a probable increase in Illinois Central outstanding stock of about 31,000 shares. Stock certificates first will be issued in temporary form, to be exchanged later for definitive certificates.

The securities with respect to which the Illinois Central proposes to assume obligation and liability are first-mortgage 5-percent gold bonds of the Alabama, due May 1, 1974, in the principal amount of $2,500,000, and refunding and improvement mortgage 5-percent gold bonds of the Vicksburg, due November 1, 1973—series B in the principal amount of $1,845,000, and series C in the principal amount of $3,746,000 [2]—or total Vicksburg bonds of $5,591,000. The Illinois Central was authorized to assume obligation and liability as guarantor of all such bonds at the time of the acquisition by the Yazoo & Mississippi Valley Railroad Company of control of the Alabama and the Vicksburg by lease. *Alabama & V. Ry. Co. and Vicksburg, S. & P. Ry. Co. Control, supra.* The expenses of consummating the mergers were estimated at a total of $5,720.

The values of the properties of the Alabama and of the Vicksburg for ratemaking purposes as of June 30, 1918, as reported by division 1, were $7,828,597 and $9,015,000, respectively. *Vicksburg, S. & P. Ry. Co.*, 26 Val. Rep. 481. Additions and betterments, less retirements, from the date of valuation to December 31, 1955, amounted to $2,792,990 and $2,735,731, respectively.

[2] Owned by the Illinois Central.

The balance-sheet statements of the Alabama and the Vicksburg as of December 31, 1956, show, in order, assets of $8,742,967 and $13,000,140. The items included therein are as follows:

	Alabama	Vicksburg
Investment in road and equipment and miscellaneous physical property, less donations and grants and depreciation on equipment	$8,037,438	$11,596,036
Current assets	150,374	142,118
Deferred assets	500,149	1,261,986
Unadjusted debits	55,006	.....
Capital stock	4,200,000	4,999,300
Long-term debt	2,500,000	5,591,000
Current liabilities	42,871	38,860
Unadjusted credits	7,429	505
Surplus	1,992,667	2,370,475

Statements of the income and earned-surplus accounts of the Alabama and the Vicksburg for the year ended December 31, 1956, show, in order: Income from leased road and equipment $378,261 and $343,755, maintenance of investment organization expenses $1,261 and $1,540, fixed charges (principally interest on funded debt) $128,168 and $92,250, net income $248,832 and $249,965, credit balance at beginning of year $1,549,693 and $2,201,611, dividend appropriations $252,000 and $249,965, miscellaneous debits $251 and $0, and credit balance transferred to balance sheet $1,546,274 and $2,209,611.

The balance-sheet statement of the Illinois Central as of December 31, 1956, shows total assets of $705,887,720 and surplus of $270,544,006. Its income statement shows net income after fixed charges of $23,759,206 for 1956. The proposed capitalization of the Illinois Central as of December 31, 1956, would be $359,985,411, consisting of $128,780,000 of Illinois

Central present long-term debt, $5,606,000 of obligations to be assumed under the mergers, $67,608,000 of equipment obligations, $1,844,980 of amounts payable to affiliated companies, and $156,146,431 of capital stock. Its capitalizable assets in road and equipment property alone are $545,222,880. A constructed balance-sheet statement shows that the Illinois Central will increase its total assets by $2,565,469.

The interveners at the time of the hearing represented holders of over 2,400 shares of leased lines' stocks. Of that amount, 470 shares of Alabama stock were acquired subsequent to our approval of the leases of the properties, or during the period June 1951 to October 1956, at prices ranging from $133 to $172 a share, and 80 shares of Vicksburg stock were acquired between December 1952 and June 1956 at prices ranging from $127 to $133 a share. Of the 470 shares of Alabama stock, 110 shares were purchased in 1953, 50 in 1954, 100 in 1955, and 100 in 1956, at prices above $155 a share but only 20 shares cost $170 or more. The record does not disclose the prices paid for the remaining shares in the hands of interveners or other minority stockholders.

The opposition to the application is based principally on the ground that the merger could not be effected as a matter of law, as the leases are uncancellable and applicants cannot require interveners to surrender their stock, or, in the alternative, on the ground that the offer for the leased lines' stocks would constitute inadequate compensation. It is argued that lessors' stocks are of exceptionally high value, as the dividends thereon are guaranteed by the Illinois Central for the next 325 years; that the stockholders are entitled to compensation for tax and other savings that would accrue to the Illinois Central as a result of the mergers; and that the values placed on the stocks for the purposes of the exchange should

reflect the earning power and strategic position of the properties owned by the leased lines.

Interveners' contention that the merger cannot be legally effected presents no issue for our determination. Unquestionably, the proposed mergers are transactions within the scope of subparagraph (a) of section 5 (2) which we have jurisdiction to approve, provided we make, as we herein do, the necessary findings required by that section. Compare *Schwabacher* v. *United States*, 334 U. S. 182, and *Wheeling & L. E. Ry. Co. Lease*, 271 I. C. C. 713, 730. Effectuation of the mergers, after approval by us, is governed by the provisions of subsection (11) of section 5.[3]

One of the counsel for interveners estimated the value of the leased lines' stock at $283.57 a share for the Alabama and $244.48 a share for the Vicksburg. These amounts were computed by adding to book values of $212.97 and $190.88, respectively, amounts ($70.60 and $53.60) produced by capitalizing at 5 percent $3.53 and $2.68, respectively, the last amounts representing the portion allocated to each share of

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[3] That subsection provides: "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect * * *."

one-half of the anticipated savings from the mergers.[4] However, these calculations do not take into account any liability which would accrue to the Illinois Central for income taxes as result of the savings. Interveners also compared the return on the investment in the leased lines' stocks to an annuity and, on the basis of the $6 and $5 annual dividend payment plus one-half of the merger savings, all capitalized at 3 percent, arrived at a value of $317 a share for the Alabama and $256 a share for the Vicksburg stocks. We are of the opinion that the foregoing calculations do not afford a sound basis for evaluation of the leased lines' stocks. Nor can we agree with the view of interveners' witness that these stocks are superior in quality to long-term United States bonds.

In a consideration of interveners' claim regarding the reasonableness of the proposed terms of the merger, pertinent are the following quotations from the decision of the United States Supreme Court in *Schwabacher v. United States, supra:*

> In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good.
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[4] The merger savings per share of stock are determined on the basis of estimated savings in income taxes by the applicant of $297,666 annually in connection with the Alabama and $268,408 in connection with the Vicksburg, divided equally between such companies and the applicant. Thus, the Alabama is given credit for $148,333 and the Vicksburg $134,204.

> In determining whether each class of stockholder receives an equivalent of what it turns in, the Commission, of course, is under a duty to see that minority interests are protected, especially when there is an absence of arm's length bargaining or the terms of the merger have been imposed by management interests adverse to any class of stockholders.

Interveners' counsel offered a motion at the hearing to require applicants to furnish a statement segregating the traffic revenues derived from operation of the leased properties, in order to determine the value of the stocks from the standpoint of earnings contributed to the Illinois Central, citing *Southern Ry. Co. Purchases*, 275 I. C. C. 724, where the lease had expired. The motion was denied by the examiner. We have heretofore held that where a lease in perpetuity is involved, such as is the case here for all practical purposes, earnings of the leased properties are not of controlling importance, and that the rental, in effect, represents the earnings of the property as far as the stockholders of the leased lines are concerned. *Delaware, L. & W. R. Co. Merger*, 257 I. C. C. 91. The fact that the Illinois Central controls the leased lines, contrary to the situation in the case cited, affords no sound basis for a different conclusion in this case. The examiner's ruling is sustained.

As hereinbefore indicated, interveners also contend that in determining a just and reasonable price for the stock, the leased lines should be given credit for one-half of the savings which would accrue to the Illinois Central as a result of the mergers, citing *Florida East Coast Ry. Co. Reorganization*, 282 I. C. C. 81, 159, and *Louisville & N. R. Co. Merger*, 295 I. C. C. 457, 497. The facts in those cases are quite distinguishable from those present here. In the

cited cases, the considered savings were to be made in operating expenses by combining operations theretofore conducted under separate ownership. Thus, in considering the future earnings of the properties, and the relative contribution thereto by each party, it was necessary to make a just allocation of that portion of the earnings which would be brought about by a combination of the properties. As to these earnings, it could not be found that one carrier contributed more than the other, and an equal division of these revenues appeared just. Here, all of the so called savings (with the exception of an insignificant amount resulting from the elimination of expenses of maintaining the leased lines' separate corporate existence and preparing reports and accounting statements) would come about through elimination of the income taxes payable by the Illinois Central or its subsidiary with respect to the amounts paid as dividends on the leased lines' stocks. The actual savings to be effected in any future year are dependent upon the provisions of the Internal Revenue Code then in effect. These savings would result solely from application of the income tax laws and not as a result of any contribution made by the stockholders of the leased lines, and in our opinion they are entitled to no credit therefor.

When the considered properties were leased in 1926, the stockholder ceased to have any interest or concern in the operations or earnings of the properties so long as the leases are in effect, their interest being restricted to the receipt of dividends in the amount of $6 and $5 per share, respectively, during the term of the leases. We are mindful of the possibility that insolvency of the Illinois Central could result in termination of the leases before their maturity; but, even if that company should become subject to reor-

ganization proceedings under section 77 of the Bankruptcy Act, it is unlikely that the leases would be terminated unless it then appeared that the earnings from the subject properties were insufficient to warrant continuance of the rental payments. Thus, the possibility that the stockholders will receive a return in excess of the indicated dividends during the term of the leases is extremely conjectural and remote. The terms of the proposed merger are sufficiently generous to compensate for the surrender of this remote possibility.

For all practical purposes, the stocks of the leased lines have a value to their owners measurable solely by the fixed rental payable under the leases and the dividends payable therefrom on the stock. The evidence adduced by applicants, hereinbefore referred to, adequately supports the reasonableness, indeed the liberality, of the terms offered to the minority stockholders. It is obvious that the prices at which these stocks have been bought and sold during recent years are artificially inflated and in excess of the intrinsic worth of the stocks by reason of the Illinois Central's purchases and the prices approved by us in connection with the authorizations for their acquisition.

As of November 1956, 14 guaranteed railroad stocks, having characteristics similar to those here involved, sold at prices resulting in yields averaging 4.91 percent, and ranging from 4.42 percent with respect to the Wheeling and Lake Erie Railway Company common to 5.26 percent in the case of Mahoning Coal Railroad Company preferred and the Delaware Railroad common.[5] On June 10, 1957, the

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[5] Information contained in Bank & Quotation Record (February 1958) shows that the prices on these stocks have not increased since the hearing but are generally lower.

Illinois Central consolidated mortgage 3¾ percent bonds, series A and B, due 1979, which with other series are secured by a first mortgage on the company's properties, were bid at prices yielding 4.58 percent, and the series H 3⅜ percent bonds, due 1989, at prices yielding 4.50 percent. Recent quotations indicate no substantial increase in those prices since the hearing. It should be pointed out that, as hereinbefore described, each of the respective lines has a substantial amount of mortgage bonds outstanding which, in the event of liquidation or reorganization, would be entitled to priority over the interests of holders of the considered stocks.

Upon consideration of all the evidence, we are of the opinion and find that the fair values of the considered stocks do not exceed amounts which would be produced by capitalizing the respective dividends at a rate between 4.25 and 4.50 percent. Capitalizing the dividends at the lower of these rates would produce $141.18 per share for the Alabama stock and $117.65 per share for the Vicksburg stock. However, to avoid any possibility of injustice to the minority stockholders and to afford the present holders of these stocks the same prices which we have heretofore authorized Illinois Central to pay, and in view of the latter's willingness to pay the larger amounts or to exchange its stock upon the basis of the indicated prices, we are of the opinion that it will be consistent with the public interest to approve the merger upon the terms proposed, and that under these terms the holders of the leased lines' stocks will receive the fair economic equivalent of the rights surrendered by them. It is to be noted that the minority stockholders may elect to receive cash equal to or exceeding the fair value of their stock or to exchange their stock for stock of the Illinois Central without incurring

Federal income tax liability in connection therewith. Thus, they may either withdraw their capital or maintain an interest in the Illinois Central operations, including a diluted interest in the properties of the leased lines.

The proposed mergers will have no adverse effect on existing transportation service to the public, as present operations will be continued by the Illinois Central as owner of the properties instead of as lessee. No other carrier has requested to be included in the transaction. No increase in fixed charges will result, and the transaction does not contemplate any guaranty or assumption of payment or assumption of payment of dividends. The guaranty by the Illinois Central of the payment of the principal and interest on the outstanding securities of the leased lines will not be inconsistent with the public interest. The proposal will enable the Illinois Central to effect its long-contemplated plan of merging the properties of the leased lines with its own, which would result in elimination of expense of maintaining separate corporate entities and in some savings in taxes, and in the preparation of various reports and special accounting statements.

In *Alabama & V. Ry. Co. and Vicksburg, S. & P. Ry. Co. Control, supra*, the Commission approved leases of the properties involved herein by the Yazoo and Mississippi Valley Railroad Company subject to conditions in substance requiring preservation of existing routes and channels of trade previously established by other carriers in connection with the lines involved, for a continuation of the existing neutrality of handling traffic by such lines, and that the lines should be continued as a link for traffic through existing gateways of interchange or such other gateways as might be established under our authority. Subse-

quently, in *Illinois Central R. Co. Purchase, supra,* when the applicant herein was authorized to purchase the properties of the Yazoo & Mississippi Valley and assume the leases of the Alabama and the Vicksburg, respectively, we again imposed the conditions previously prescribed in the lease case. We find in this proceeding that the public interest requires that the same conditions be imposed. Accordingly, our authorization and approval herein are to be understood as being subject to the same conditions as those shown in *Alabama & V. Ry. Co. and Vicksburg, S. & P. Ry. Co. Control, supra.* While it does not appear that railway employees will be adversely affected, our authorization will be made subject to the same conditions for their protection as were prescribed in *Chicago & N. W. Ry. Co. Merger,* 261 I. C. C. 672.

Contentions of the parties either as to law or fact not specifically discussed herein have been given consideration and found without material significance or not justified.

We find (1), subject to the conditions relative to preservation of existing routes and gateways and to protection of railway employees referred to herein, that the proposed merger of the properties of The Alabama and Vicksburg Railway Company and the Vicksburg, Shreveport & Pacific Railway Company into the Illinois Central Railroad Company, described herein, are transactions within the scope of section 5 (2) of the Interstate Commerce Act, as amended, that the terms and conditions proposed are just and reasonable, and that the transactions will be consistent with the public interest, and (2) that (*a*) the proposed issue by the Illinois Central Railroad Company of not exceeding 430,000 shares of its no-par-value common stock to be delivered in exchange for stock of The Alabama and Vicksburg Railway Com-

pany and the Vicksburg, Shreveport & Pacific Railway Company, as aforesaid, and (*b*) the proposed assumption of obligation and liability by the Illinois Central Railroad Company with respect to not exceeding $2,500,000, principal amount, of Alabama & Vicksburg Railway Company first-mortgage 5-percent bonds, due May 1, 1974, and $1,845,000, principal amount, series B, and $3,746,000, principal amount, series C, of Vicksburg, Shreveport & Pacific Railway Company refunding and improvement mortgage 5-percent bonds, due November 1, 1973, all in connection with the proposed mergers, as aforesaid, (*a*) are for lawful objects within the corporate purposes of the Illinois Central Railroad Company, and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (*b*) are reasonably necessary and appropriate for such purposes.

An appropriate order will be entered, in which suitable provisions will be made for the submission of journal entries.

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 675.

IRVING D. FRIEDMAN,

Appellant,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

BRIEF FOR THE APPELLANT OPPOSING MOTION TO AFFIRM.

IRVING D. FRIEDMAN,
Appellant, Pro Se,
1501 Broadway,
New York 36, N. Y.

SOL FRIEDMAN,
1420 New York Avenue, N. W.,
Washington 5, D. C.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

TABLE OF CONTENTS.

ARGUMENT:

PAGE

POINT I.—There is no authority in law for the Commission's action which forces appellant to accept 26 years' rent as full payment of an obligation of the tenant, Illinois Central Railroad Company, to pay 323 years' rent 1

POINT II.—There is no authority in law for the Commission's action which refuses to find the actual value of a railroad corporation being absorbed in a merger 4

POINT III.—The motion to affirm should be denied because there is no judicial decision on the question of the rights of leased line stockholders in a merger proceeding 6

APPELLANT'S ANSWERS TO THE OTHER POINTS RAISED IN THE MOTION TO AFFIRM 9

1. Appellees point out in a footnote on page 3 of their Motion to Affirm, that appellant owns about one per cent of Alabama stock, and one-half per cent of Vicksburg stock 9

2. Appellees allege that appellant has no rights in the leases between the Alabama and the Vicksburg companies, as landlords, and the Illinois Central, as tenant 10

3. The appellees' statement on page 5 of its Motion to Affirm, that Article NINE, Section 2, of each lease provides for the cessation of rental payments upon the merger of the lessor into the lessee, is inaccurate and false 11

4. Appellees' allegation that appellant conceded that he is receiving full value for his stock, is likewise inaccurate and false 12

CONCLUSION 14

Table of Cases.

PAGE

Case v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 10

Delaware, L. & W. R. Co. Merger, 257 I. C. C. 91....2, 3, 6, 7, 9

Illinois Central Railroad Company Purchase, I. C. C. Finance Docket No. 17288, decided May 23, 1951, not officially reported..... 8

McLean Trucking Co. v. *United States*, 321 U. S. 67.... 5

Schwabacher v. *United States*, 334 U. S. 182, decided in 1948 7

Southern Railway Co. Purchase, I. C. C. Finance Docket No. 16167, 275 I. C. C. 724 (1950)..... 8

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 675.

IRVING D. FRIEDMAN,

Appellant,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

BRIEF FOR THE APPELLANT OPPOSING MOTION TO AFFIRM.

Appellant files this brief, in accordance with Rule 16, paragraph 3, of the Rules of this Court, in opposition to the motion of the appellees to affirm.

ARGUMENT.

POINT I.

There is no authority in law for the Commission's action which forces appellant to accept 26 years' rent as full payment of an obligation of the tenant, Illinois Central Railroad Company, to pay 323 years' rent.

The error made below can be found in the opinion of the District Court, where the Court quoted, with approval, the following part of the Commission's Report (Jurisdictional Statement, p. 23):

> "Upon consideration of all the evidence we are of the opinion and find that the fair values of the considered stocks do not exceed amounts which would be produced by capitalizing the respective dividends at a rate between 4.25 and 4.50 per cent. Capitalizing the dividends at the lower of these rates would produce $141.18 per share for the Alabama stock and $117.65 per share for the Vicksburg stock."

This is error because there is no common law or statutory authority which gives the Commission the right to capitalize the rental income payable under a long term lease. The Commission's action, approved by the Court below, in capitalizing the present worth of the rental payable under a 323 year lease, stems entirely from an assumption of power which the Commission does not have. The Report of the Commission is predicated on the clearly erroneous conception that the Commission, under its broad power to approve mergers of railroads, has the power to capitalize the rental income payable by a railroad tenant under a lease. It can point to no statute or judicial decision to authorize a merger on such terms, which allow a long term lease to be commuted by payment of the capitalized value of the rental.

The statute under which the capitalization of rental income was done, is Section 5(2) of the Interstate Commerce Act. This statute does not authorize a leasehold liability to be capitalized. It authorizes a merger, subject to terms and conditions as the Commission shall find to be just and reasonable.

The other authority under which the Commission and the District Court assumed that it had the power to capitalize income payable under a long term lease, is the Commission's report in Delaware, L. & W. Co. Merger, 257 I. C. C. 91. That decision is not applicable here, because of

the facts and complications, peculiar to that case, which is demonstrated in Point III of this brief. *The Delaware Merger* case is not a judicial decision; and this Court said of such authority:

> "While the interpretation given a statute by those charged with its enforcement is entitled to considerable weight, it hardly is conclusive. United States *v.* Missouri Pacific R. Co., 278 U. S. 269, 280 (1929)." County of Marin *v.* United States, 356 U. S. 412.

By assuming this non-existent power to capitalize rental income payable under long term, non-cancellable leases, and applying it to appellant, the Commission and the District Court have confiscated appellant's contractual rights to all of the rentals he is entitled to receive. They by-passed the obligation of a tenant to pay rent for 323 years under 323 year leases, ignored the principle of law which requires merging corporations to be responsible for all liabilities existing at the time of the merger, and confiscated appellant's rights to guaranteed fixed dividends until the termination of the leases on July 1, 2282, by the unauthorized device of capitalizing rental income.

Appellant respectfully submits that a liability to pay rent cannot be capitalized. What can be capitalized is the earning power of a common stock. Appellant's security is not a common stock, which shares in the profits and losses of his company. Appellant's security is a guaranteed, leased line, fixed dividend stock, issued under a lease. The rental income from such a lease, which is applied exclusively to pay the fixed dividends on appellant's stock, cannot be capitalized.

The error the Commission and the District Court committed in capitalizing the rental income from the leases is clear from the result. They found $155 and $126.50 per

share as just and reasonable prices. At $6 and $5 a year per share, respectively, these prices amount to the rental for 26 years. It is not just and reasonable, as a matter of law, to allow an obligation for the payment of 323 years' rent to be discharged by the payment of 26 years' rent.

POINT II.

There is no authority in law for the Commission's action which refuses to find the actual value of a railroad corporation being absorbed in a merger.

Two railroads are being absorbed by merger into the Illinois Central Railroad Company. Yet the Commission refused to find out the actual value of these railroads. The Commission held that it didn't have to know the actual value of the railroads because they are encumbered by long term leases. The Commission stated that because the railroads were leased, there was no legal requirement for their evaluation.

This case presents the astonishing situation of the Commission giving its approval to the liquidation, by merger, of two solvent railroad corporations, without knowing anything at all about their actual value.

When appellant brought this to the attention of the District Court, that Court said the doctrine of administrative finality barred it, and appellant, from questioning the Commission's action. (Jurisdictional Statement, pp. 22 and 23.)

Appellant does not challenge the power of the Commission as the final authority on the valuation of a railroad. Nor does appellant dispute the rule of administrative finality by asking this Court to substitute its judgment for that of the Commission on railroad values. Appellant

agrees with the quotation of the District Court from *McLean Trucking Co.* v. *United States*, 321 U. S. 67, that a merger case is a complex task requiring the facilities, judgment, wisdom, knowledge and experience of the Commission.

In the cases where the Courts applied the doctrine of administrative finality to the orders of the Commission, the Commission had come to a conclusion on the valuation of railroads, which action the Courts would not upset. In this case, however, the Commission did nothing to evaluate the merging railroads, and came to no conclusion of their value.

What the Commission did was to value only the rental income from the leases, which it found to be $155 and $126.50 a share. *It never valued the railroads.* By its failure and refusal to find the actual values of the merging railroads, which is a fundamental requirement, the Commission did not carry out its function. It did not apply its facilities, judgment, wisdom, knowledge, and experience in the transportation industry to this case. Therefore its conclusion is not entitled to the benefit of the doctrine of administrative finality.

The "Alabama" and "Vicksburg" are two railroads which are earning money right now. Appellant is entitled to know, through the experience and advice of the Commission, what the earning power of each of these railroads is; and he is entitled to be paid for this earning power when it is taken away from him in a merger.

The doctrine of administrative finality requires that the findings of the Commission be adequate and supported by evidence. In this case there are no findings and no evidence of the values of the merging railroads. One of the members of the Commission did inquire of counsel for the Illinois Central of the basis for the prices fixed in these merger proceedings:

"Commissioner Mitchell: How did you arrive at what the fair value of this stock was?"

"Mr. Zoll: We arrived at it by taking the highest prices which Illinois Central had paid for A & V and V S & P stock in acquiring it."

The foregoing quotation is another astonishing point in this case, which shows that the Commission based the value of appellant's security on the highest price which Illinois Central felt like paying for it. The normal and legal standard of value is earning power, and the Commission never found out what it is.

Appellant did not ask the Commission and the District Court to find out what the earning power of his railroads would be in 2282 when the leases expire. (Jurisdictional Statement, p. 25.) Appellant did ask the Commission to find out what the earning power of his railroads are right now. Appellant is entitled, in liquidation of his rights in this merger proceeding, to the rentals required to be paid under the leases, and in addition, to the current worth of the current earning power of his companies.

POINT III.

The motion to affirm should be denied because there is no judicial decision on the question of the rights of leased line stockholders in a merger proceeding.

There is no judicial decision that appellant can find on the problem presented by this case. The only authority relied on by the Commission and the Court below is *Delaware, L. & W. R. Co. Merger*, 257 I. C. C. 91, decided in 1944, which, because of its factual complications, does not have general application to leased line stock. The Report

was never reviewed by a Court. Finally, any rulings by the Commission made in that case were rendered obsolete by the case of *Schwabacher* v. *United States*, 334 U. S. 182, decided in 1948.

In the *D. L. & W.* case, the leased line stockholders could vote for or against the merger. The Commission stated in that case:

> "Whether the stockholder wishes to avail himself of the offer of the Delaware Company is a matter for his personal decision." 257 I. C. C. 91, at 120.

In the case at bar, any vote of minority stockholders against the merger was a futility because the Illinois Central owned more than 90% of the leased line securities when it submitted the merger applications to the stockholders and the Commission for approval.

In the *D. L. & W.* case, the leased line stockholders who did not approve the merger, had the right to go into state courts to ask for the payment of their rental under the lease, for an appraisal of their stock, and for any other relief they believed they were entitled to. Appellant does not have such rights in the case at bar because this Court held in the *Schwabacher* case, 334 U. S. 182, that no rights given to security holders by state laws survived a merger after it was approved by the Interstate Commerce Commission.

In the *D. L. & W.* case the lease was in default. Payment of the rent to the leased line stockholders had been suspended and enjoined. There was also a serious income tax dispute in that the landlord, Delaware, L. & W. R. Co., claimed that the corporation income tax payable on the rental payments, amounting to 40% thereof, should be deducted from the rent paid to the leased line stockholders.

That case is an individual one which does not clarify the legal rights of other leased line stockholders.

Decisions and Reports of the Commission are in conflict with each other, and in conflict with the case on appeal here.

In *Illinois Central Railroad Company Purchase,* I. C. C. Finance Docket No. 17288, decided May 23, 1951, not officially reported, which involved the merger of the properties of the leased Chicago, St. Louis & New Orleans Company into the Illinois Central Railroad Company, the Commission did not void the lease between the two companies, but held:

> "The payment of $4 a share on the leased-line stock certificates, which are not surrendered as a result of this proposal, will be continued, but upon consummation of the transaction all the capital stock of the New Orleans Company will be redeemed and cancelled."

and

> "Nevertheless, if leased-line certificates remain outstanding after the termination of the trust, the applicant will continue to redeem at par value any and all of such certificates that may be surrendered; and until they are redeemed, will continue the $4 annual payment mentioned, as previously stated."

In *Southern Railway Co. Purchase,* I. C. C. Finance Docket No. 16167, 275 I. C. C. 724 (1950), which involved the 50 year lease of the Richmond and Mecklenburg Railroad Company to the Southern Railway Company, the Commission held that the actual earning power of the leased line company was the primary consideration in a merger of the leased line into the Southern.

This ruling in the *Southern Railway Purchase* case that the actual earning power of a leased line company is the primary consideration in a merger, conflicts with the rule in the case at bar, in which the Commission holds that the

actual earnings of a leased company, involved in a merger, must not even be considered.

The *Delaware, L. & W.* case, 257 I. C. C. 91, on which the Commission and the District Court relied in coming to the conclusion that the actual earnings of a leased line company are irrelevant in a merger of such a company, contains the following vague and indefinite language:

> "The earnings from the operation of the property of the New York company, which as stated have not been segregated from those of the system, are not of controlling importance here."

In stating that they are not of controlling importance, the Commission, by inference, means they do have some importance. How much importance "not of controlling importance" means, is left undecided by the Commission.

Because of the lack of judicial authority, and the conflict and vagueness of the reports of the Interstate Commerce Commission, this Court should hear and determine this case. The rights of leased line stockholders should be clarified by a decision of the highest court.

Appellant's Answers to the Other Points Raised in the Motion to Affirm.

1. Appellees point out in a footnote on page 3 of their Motion to Affirm, that appellant owns about one per cent of Alabama stock, and one-half per cent of Vicksburg stock.

The District Court pointed out in a footnote to its opinion, which is on page 19 of the Jurisdictional Statement, that "at the time of the order under attack plaintiff owned about one per cent of Alabama stock and one-half per cent of Vicksburg stock."

This is an unfair and irrelevant factor. It has nothing to do with the merits of appellant's case. It can only have been inserted in the opinion of the Court and in the Motion to Affirm to prejudice appellant personally, by asking this Court to infer that appellant is a nuisance minority.

If a legal wrong has been done to appellant, he has the standing to ask this Court to redress such wrong. Appellant is entitled to justice, even though he is a small stockholder.

In *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, this Court found that a plan of reorganization, which had been overwhelmingly approved by the security holders, 92.81% of the bondholders, 99.75% of the Class A stockholders, and 90% of the Class B stockholders having voted in favor of it, was not fair and equitable. The only one who objected to the plan was a bondholder owning $18,500 par value of a large bond issue which amounted to $3,807,071. This Court held that such bondholder, who owned only ½ of 1%, was right in his contention that the proposed plan was not fair and equitable.

This Court held that where a plan is not fair and equitable, it cannot and should not be approved, no matter how many security holders consent to it:

> "Accordingly the fact that the vast majority of the security holders have approved the plan is not the test of whether the plan is a fair and equitable one."
>
> *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106.

2. Appellees allege that appellant has no rights in the leases between the Alabama and the Vicksburg companies, as landlords, and the Illinois Central, as tenant.

This contention is without merit. Reference to the leases are endorsed on appellant's certificates. Such endorse-

ments, and the leases, state that the lessee has covenanted to pay a sum equal to 6% of the par value of the Alabama stock, (5% on the Vicksburg stock) in semi-annual payments of 3% on each April 1 and October 1, until July 1, 2282. The complete endorsement is in the footnote numbered 4 of the District Court's opinion on pages 21 and 22 of the Jurisdictional Statement.

This clear language gives to the appellant and every other stockholder of Alabama and Vicksburg, a vested interest in the leases, to the extent of the shares he owns. Such vested interest in the leases cannot be impaired or reduced by a merger. Contrary to the opinion of the District Court, and the argument of the appellees, the Illinois Central has guaranteed the rental payments on each stock certificate to each holder of the Alabama and the Vicksburg stock.

3. The appellees' statement on page 5 of its Motion to Affirm, that Article NINE, Section 2, of each lease provides for the cessation of rental payments upon the merger of the lessor into the lessee, is inaccurate and false.

Article NINE, Section 2 of the leases is quoted in the footnote on page 21 of the Jurisdictional Statement. It DOES NOT, in exact words or by inference, provide for the cessation of rental payments upon the merger of the lessor into the lessee. It does authorize such a merger, but it does not provide for the slightest diminution of any rental payments.

Like every other merger, a merger of the lessor into the lessee can only be made on terms that are just and reasonable. This requires that the Illinois Central redeem its obligations under the lease by paying all of the rent it owes thereunder to the maturity of the leases. After it

does that, it can apply to merge. It can't merge while it still owes rent for 323 years under a 323 year lease.

4. Appellees' allegation that appellant conceded that he is receiving full value for his stock, is likewise inaccurate and false.

Appellant has always contended before the Commission, the District Court, and this Court, that he is entitled to all of the rent payable under the 323 year leases, which amounts to $1942.50 on each share of Alabama stock and to $1618.75 on each share of Vicksburg stock. In addition, appellant has always contended that he is entitled to be paid the value of his stock, based on the actual value of the merging railroads.

Now, the appellees claim, by reference to a colloquy between appellant and the District Court, that appellant conceded he is receiving full value for his stock by the merger terms, which were approved by the Commission, of $155 and $126.50 per share for Alabama and for Vicksburg stock, respectively.

The statement appellant made to the Court, which is on page 7 of the Motion, is:

> "Yes, I agree with them that that is what its present worth is."

This statement was made in response to the Court's remark that

> "Its present worth would be discounted, I suppose."

No concession was made by appellant that the prices of $155 and $126.50 were fair. The District Court, with whom the colloquy took place, never understood that appellant was conceding that such prices were just and reasonable.

Appellant does agree that if the rental income payable

over the term of the lease is discounted, that the present worth of such discounted future rental payments is $155 and $126.50 per share, but appellant told the Court in the same colloquy:

> "Another reason this merger is contrary to law is that you can't reduce obligations and liabilities by merging. The Illinois Central owes me a contract to pay me $6 a year and $5 a year for 325 years. They have got to owe me the same contract after the merger that they owed me before the merger. * * *"
>
> * * * * * *
>
> "I have been damaged or injured because they have no right to pay me off at what it is worth. In a merger you have to pay or assume liabilities. You can't pay what they are worth."
>
> "I say it is absolutely irrelevant what it is worth. This can be worth $50 or $5,000; they have no right under the law to pay me what it is worth. They have got to pay me what it amounts to. This lease is an obligation that the Illinois Central must first redeem and pay off in full. After the lease is redeemed and terminated, then they can apply to merge."
>
> "But while they owe me the lease and this contract for the payment of fixed dividend for 325 years, that is a legal impediment to a merger."

Appellant contends that neither the Commission nor the Courts have any legal right to discount the future rental payments required to be made by Illinois Central, and to force appellant to take the present worth of any such discounted rental payments. No statute and no legal authority gives the Illinois Central the right to discount the rental payable over the term of the leases. On the contrary, it must pay the full amount of such rental.

Through all the proceedings in the Interstate Commerce Commission, the District Court, and in this Court, appellant has appropriately objected that the proposed mergers were, and still are, not just and reasonable.

Conclusion.

The questions on which this case depends are substantial, and are of general interest to railroads with leased line securities outstanding, and to the holders of such leased line securities.

Although it is not in the record, appellant asks leave to state to this Court that because of the economic pressure of lower gross revenues, and higher operating costs, railroad officials are considering mergers now more than at any time in the past 25 years. Major merger studies under way involve 18 railroads, representing over 23% of the Class I rail mileage in the United States. Some of the railroad mergers now being studied, are:

The Norfolk & Western Railway with the Virginian Railway.

The Atlantic Coast Line Railroad with the Seaboard Air Line Railroad.

The New York, New Haven & Hartford, the Boston & Maine, the Maine Central, the Bangor & Aroostock, and the Rutland Railway.

The Erie Railroad, the Delaware & Hudson Railroad, and the Delaware, Lackawanna & Western Railroad.

The Great Northern, the Northern Pacific, and the Chicago, Burlington & Quincy railroads.

The Minneapolis, St. Paul, Sault Ste. Marie, the Wisconsin Central Railroad and the Duluth, South Shore & Atlantic Railroad.

In addition, the Presidents of the New York Central Railroad and Pennsylvania Railroad have said their roads are still interested in mergers, even though discussions between the two have ended.

Most of these railroads have leased line securities, with fixed guaranteed dividend stocks, outstanding. If any of these merger studies develop into a reality, the problem of the rights of the leased line stockholders involved, will inevitably follow.

There is hardly any law in this field. The decisions and reports of the Interstate Commerce Commission are conflicting.

It is respectfully submitted that because this case is the first of its kind, this Court should hear it, so that the law will be established and clarified on the rights of leased line stockholders in mergers.

February 24, 1959.

Respectfully submitted,

IRVING D. FRIEDMAN,
Appellant, *Pro Se*,
1501 Broadway,
New York 36, N. Y.

SOL FRIEDMAN,
1420 New York Avenue, N.W.,
Washington 5, D. C.

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Supreme Court of the United States

No. 675 October Term, 1958.

IRVING D. FRIEDMAN,

Appellant,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

PETITION FOR REHEARING.

Irving D. Friedman,
Appellant, *Pro Se*,
1501 Broadway,
New York 36, N. Y.

Sol. Friedman,
1120 New York Avenue, N.W.,
Washington 5, D. C.

Supreme Court of the United States

No. 675 October Term, 1958.

Irving D. Friedman,

Appellant,

against

United States of America and Interstate Commerce Commission,

Appellees.

PETITION FOR REHEARING.

Appellant files this petition, pursuant to Rule 58(1), for a rehearing of the judgment of affirmance, dated March 30, 1959, because appellant believes it is an erroneous judgment.

The judgment of this Court is erroneous because, after appellant's arguments are denied, and the judgment of affirmance is added to the record, there still remains no factual, rational, or legal basis on which a Commission or Court can find that the prices to be paid to appellant are just and reasonable.

Appellant's primary argument was: when the Illinois Central signed 350 year leases and guarantees of dividends in 1925 with the Alabama and the Vicksburg companies, the Illinois Central became liable for the full amount of such rentals and guaranteed dividends for the duration of the leases. By its judgment of affirmance, this Court necessarily rejected this argument and came to the conclusion that the landlord and tenant corporations, by agreeing to merge with each other, had the power to, and did, dissolve the leases between them.

Therefore, when this Court allowed the leases to be dissolved, it left appellant in the status of a stockholder of the Alabama and the Vicksburg companies, with no leases and no guaranteed dividends, which is that of an ordinary common stockholder. As an ordinary common stockholder, dissenting from a merger, appellant is entitled to have his stock valued by the Interstate Commerce Commission on the basis of the earning power of his stock. There is nothing in the record to show what the factual or legal basis is for this court's conclusion, which is implicit in its judgment of affirmance, that the prices of $155 and $126.50 for appellant's shares are just and reasonable. These prices are based only on the capitalized value of the rental. *The Commission never valued the Alabama and the Vicksburg companies.*

This is the first time a railroad merger has been approved with no evidence of the value of the railroads.

Appellant is not asking this Court to disagree with the Commission on the question of the earning power of railroads. Nor is appellant asking this Court to disagree with the Commission on the question of values of railroads. Appellant recognizes that the Commission is the final authority on matters of valuation.

What the appellant is asking this Court to do, is to modify its judgment of affirmance to the extent of directing the Commission to find out what the earning power of appellant's railroads is, and to fix a valuation based on such earning power. Appellant will accept such values. As a stockholder in publicly owned railroads, appellant is entitled to the expert advice of the Commission on the valuation of his railroads.

As the record now stands, this Court's judgment of affirmance is an erroneous one, because there is no factual,

rational or legal basis for the valuation of appellant's securities as railroad common stocks.

April 17, 1959.

Respectfully submitted,

IRVING D. FRIEDMAN,
Appellant, *Pro Se*,
1501 Broadway,
New York 36, N. Y.

SOL FRIEDMAN,
1420 New York Avenue, N.W.
Washington 5, D. C.

Certificate of Counsel.

I am the appellant, and a member of the Bar of this Court. I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

April 17, 1959.

IRVING D. FRIEDMAN.